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ALEXANDER L. STEVAS,

No. 80-2128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Petitioner,

v.

WILLIAM DAVID HENSLEY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals adhered to the statutorily mandated standard of review in its reversal of a denied claim for workers' compensation benefits under 33 U.S.C. § 901 *et seq.*, as extended to the District of Columbia pursuant to 36 D.C. Code § 501 *et seq.*

PARTIES BELOW

In the Court below, Petitioner Washington Metropolitan Area Transit Authority, appeared as Respondent, and William D. Hensley, Respondent herein, appeared as Petitioner. The Director, Office of Workers' Compensation, U.S. Department of Labor, did not appear in the Court below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported in the official reports, but has been reported at 13 BRBS 182 (1981). The Decision of the Benefits Review Board of the Department of Labor is reported at 11 BRBS 468 (1979). The Opinion and Order of the Administrative Law Judge of the Office of Workers' Compensation Programs is an unreported opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 17, 1981. No petition for re-hearing was filed in that Court. Jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

The respondent in this case, William David Hensley, has driven a bus in the District of Columbia for more than 30 years. As a bus driver, Mr. Hensley spent most of his working day sitting, using his hands and feet to operate the bus. Mr. Hensley has had psoriasis since 1967, but before August 1977 his condition was medically controlled and had never interfered with his work.

In June and July 1977, Mr. Hensley's working conditions changed dramatically. His route took him over streets which were under construction, which meant that the ride was extremely rough. In addition, his bus had notably poor suspension, an uncomfortable driver's seat, and a steering ratio requiring greater effort for turns than that required for other buses owned by WMATA. Consequently, Mr. Hensley was bounced severely at certain points of contact, especially his left hand, the small of his back, and the undersides of his thighs. It was at that time that his psoriasis worsened: his skin began to dry out, peel and crack; his hands bled as he manipulated the steering wheel.

By August 15, 1977, the petitioner was forced to stop working. His treating physician, Dr. David Mitchell, prescribed medication to alleviate his symptoms, which included bleeding pustular lesions on the palms of his hands

and on the soles of his feet. By August 23, 1977, Mr. Hensley attempted to return to driving a bus although Dr. Mitchell had warned him driving a bus would worsen his condition. He was able to work only until September 5, 1977 when his hands began to crack and bleed. Dr. Mitchell took him off work, and again instituted conservative medical treatment. Because Dr. Mitchell's treatment was not completely effective, Mr. Hensley was subsequently treated with PUVA (photo-chemical) therapy under the direction of the chairman of the Dermatology Section of the Washington Hospital Center, Dr. Thomas P. Nigra. After Mr. Hensley stopped work, his condition improved and stabilized. (Pet. App. 96a, 97a).

Dr. Mitchell, who had been treating Mr. Hensley for psoriasis since 1970, testified that operating a bus under adverse road conditions had aggravated his underlying condition of psoriasis. Dr. Thomas P. Nigra, also Mr. Hensley's treating physician, testified that Mr. Hensley's skin condition was employment aggravated:

> When I saw him, he had physically disabling psoriasis of his left hand. He is a Metro Bus driver, and there is little question that he uses his hands in his work. Psoriasis is a capricious disease which waxes and wanes and comes and goes without cause. However, we definitely do know that trauma to an area of skin in a patient who has extensive psoriasis will result in a flare of psoriasis in the traumatic area. It is my opinion that using his hands in his work the way Mr. Hensley does at a bus driver could result in trauma and therefore flaring of his basic condition.
> (Pet. App. 84a, 85a.)

Employers medical witness, Dr. Robert Stolar, examined Mr. Hensley [Pet. App. 84(a)] on one occasion, May 18, 1978 nine months after Mr. Hensley had stopped work and after Mr. Hensley's condition had stabilized medically.

B. Procedural History

Respondent, William D. Hensley, filed a claim for temporary total disability benefits under 33 U.S.C. § 908(b). Following a denial of his claim by an Administrative Law Judge on November 28, 1978, respondent appealed the adverse decision to the Benefits Review Board, United States Department of Labor. The denial of claimed benefits was affirmed by the Benefits Review Board on October 31, 1979.

The United States Court of Appeals for the District of Columbia Circuit reversed the decision of the Benefits Review Board on March 17, 1981, holding that the Administrative Law Judge had failed to properly apply the statutory presumption favoring the claimant in a case where no substantial evidence was presented to contradict his claim.

ARGUMENT

The decision of the Court of Appeals is clearly correct. Moreover, this case raises no novel question of federal law, nor is there any conflict between the circuit court of appeals.

I.

THE COURT OF APPEALS, ADHERING TO THE "SUBSTANTIAL EVIDENCE" RULE, PROPERLY REVERSED THE DENIAL OF DISABILITY BENEFITS BY THE BENEFITS REVIEW BOARD

A careful reading of the majority decision of the Court of Appeals below reveals strict adherance to the well-established standards of judicial review.

Further review by this Court is thus not warranted, and the present petition for writ of certiorari should be denied.

The respondent's claim for compensation benefits was made pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as made applicable to the District of Columbia 36 D.C. Code § 501 *et seq.* The standard of review for decisions made under the Act is well established. The factual findings and inferences made by the Administrative Law Judge must be affirmed if they are supported by substantial evidence, are not irrational, and are in accordance with the law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). However, the inferences drawn by the Administrative Law Judge must be reviewed in accordance with the judicial mandate that the Act be construed liberally in order to effectuate its remedial and beneficial purposes. *Great American Indemnity Co. v. Britton,* 186 F. Supp. 938 (D.D.C. 1960). Additionally, in the process of applying the Act to the circumstances surrounding the particular claim, "doubts, including the factual, are to be resolved in favor of the employee or his dependent family." *Friend v. Britton,* 220 F.2d 820 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 836 (1955); *Howell v. Einbinder,* 350 F.2d 422 (D.C. Cir.

1965); *J.V. Vozzolo, Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967).

It has long been recognized that a reviewing body may not reweigh the evidence nor consider it de novo, but can only inquire whether there is substantial evidence in the record to support the findings of the Administrative Law Judge. *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1971). However, the reviewing body is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner. *Howell v. Einbinder,* 350 F.2d 422 (D.C. Cir. 1965). Respondent submits that a review of the record below by the Court of Appeals revealed that the conclusions drawn by the Administrative Law Judge were irrational, not supported by substantial evidence in the record, not in accordance with the law of this jurisdiction, and were, therefore, properly reversed.

At the administrative hearing below, the respondent, William D. Hensley, presented overwhelming lay and expert testimony in support of his claim that his pre-existing skin condition was aggravated by his employment as a bus driver. As the Court of Appeals noted, Mr. Hensley's testimony concerning the flare-up of his psoriasis following adverse driving conditions was uncontradicted, as was the fact that his condition totally precluded his return to work as a bus operator.

At the administrative hearing, both of Mr. Hensley's treating physicians, noted dermatologists, testified that Mr. Hensley's psoriasis was aggravated by his employment duties, and had resulted in his inability to continue working as a bus operator. The Court of Appeals, after a review of this expert testimony, determined that the medical testimony was wholly consistent with the respon-

dent's theory of a work-related aggravation of his skin condition. The respondent clearly had a compensable claim, contrary to the conclusions of the Administrative Law Judge:

> In sum, Dr. Mitchell's overall testimony was consistent with at least two theories of work-related aggravation namely, that pustular lesions appeared initially as a response to the physical trauma of driving, or that driving aggravated existing lesions to the point that they cracked, bled and made driving impossible. It is possible both things happened. In either case work-related aggravation of an underlying psoriatic condition is clearly established on this record. It is, frankly, difficult for us to discern how the Administrative Law Judge and the Benefits Review case, work-related aggravation of an underlying psoriatic condition is clearly established on this record. It is, frankly, difficult for us do discern how the Administrative Law Judge and the Benefits Review Board could deny his claim based on this evidence, especially when the statute as construed by our court and others, *see* cases cited at pp. 5, 7-8, *supra,* presumes causality "in the absence of substantial evidence to the contrary." 33 U.S.C. § 920. (Pet. App. at 19a).

The Court of Appeals determined after reviewing 1) the uncontradicted testimony of the claimant, 2) the testimony of the two treating physicians, and 3) a leading medical text for attorneys, 6 P. *Cantor, Traumatic Medicine and Surgery for the Attorney,* 640-41 (1962)[1] that the Administrative Law Judge badly misunderstood the medical testimony, and that the Administrative Law Judge's final conclusion that Mr. Hensley's condition was inconsistent with his "entire theory of causation" was simply a *non sequitur.* (Pet. App. 25a).

In short, the factual conclusion drawn by the Administrative Law Judge was irrational, and not supported by the substantial evidence in the record. Reversal by the Court of Appeals under such circumstances was not only proper, but mandated by the directives of this Court in *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965). Moreover, the Court of Appeals correctly determined that as the petitioner/employer had failed to produce substantial evidence to contradict either the presumption of compensability under 33 U.S.C. § 920(a) or the direct testimony of Mr. Hensley and his treating physicians reversal was required.

Section 20 provides, in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) That the claim comes within the provisions of this Act. 33 U.S.C. § 920(a).

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[1]Said treatise was cited in all of respondent's trial briefs and was, contrary to petitioner's assertions, a part of the record.

The presumption operates in favor of the claimant unless and until "substantial evidence" is presented by the respondent showing that the claimant's malady did not arise out of and in the course of employment. At that point, the presumption "falls out of the case." *Del Vecchio v. Bowers,* 296 U.S. 280, 286 (1935); *Swinton v. Kelly,* 554 F.2d 1075, 1082 (D.C. Cir. 1975), *cert denied,* 429 U.S. 820 (1976). In order to overcome the presumption of compensability under Section 20, the employer's "substantial evidence" must be "specific and comprehensive enough to sever the *potential* connection" between the disability and the work environment. *Parsons Corp. of California v. Director, Office of Worker's Compensation Programs,* 619 F.2d 38, 41 (9th Cir. 1980).

The Court of Appeals in the past has refused to "sustain the administrative findings merely because they are substantiated by some isolated evidence." *Friend v. Britton, supra,* 220 F.2d at 821.

In the case at bar, the only testimony adverse to the claimant was the testimony of Dr. Robert Stolar, a medical witness hired by the employer. Dr. Stolar examined Mr. Hensley on *one* occasion *nine months* after the claimant ceased work. In his first letter to the employer, Dr. Stolar indicated he was "unable to determine that it [Hensley's condition] was work-related or work aggravated." [Pet. App. 94(a).] At the administrative hearing, Dr. Stolar further testified that he could not "visualize" the pattern of injury that would have aggravated Mr. Hensley's condition:

> A: In my experience the pattern of work that he carried on does not produce psoriatic lesions by the only known traumatic mechanism which I mentioned for the Koebner phenomena, which

> would require a different type of injury than what I could visualize that he received at any time. [Pet. App. 76(a).]

As noted by the Court of Appeals, the record below evidenced a total lack of expertise on the part of Dr. Stolar in his erroneous description of the type of trauma Mr. Hensley was subject to as he drove his Metro bus over a rough construction route:

> More importantly, however, there is no evidence in the record that this third doctor had any particular experience or knowledge upon which to base his opinion regarding Hensley's "work pattern" as a bus driver, or his opinion regarding the "constant frictional pattern" to which Hensley was subjected on his particularly rough bus route during July and August of 1977. Dr. Stolar, while an accredited dermatologist, was not shown to have had any experience from which to estimate what sort of trauma Hensley was receiving from driving on his particular bus route, or which parts of the body received stress from such driving. At one point the Administrative Law Judge had to point this out:
>
> > Judge Giesey: Counsel, Dr. Stolar is an impressively credentialed member of a learned profession; but I do not think this is part of what he learned. I know as much about driving as the Doctor does . . .
>
> App. at 84. Therefore, since this doctor's ultimate opinion on work-relatedness was based entirely upon his "visualiz[ation]" was not derived from any particular experience of knowledge, we find that Dr. Stolar's opinion on the issue of

> aggravation is not entitled to the "substantial" weight which it must have to overcome the Congressionally mandated presumption. [Pet. App. 21(a)]. [Pet. App. 21(a)].

The Court of Appeals was not, as alleged by petitioner, improperly reweighing the medical evidence, but was properly reviewing the record as a whole below to determine whether substantial evidence existed to support the conclusions of the Administrative Law Judge. The Court of Appeals found Dr. Stolar's testimony failed to rise to the level of "substantial evidence" in light of the fact that 1) Dr. Stolar initially was *unable* to determine if Mr. Hensley's skin condition was work aggravated; i.e. could express no opinion; and 2) that Dr. Stolar's "visualization" of the kind of trauma involved in Mr. Hensley's operation of the bus was inaccurate, based on the *uncontradicted testimony* of an expert in the field: William D. Hensley, a bus operator of 32 years experience.

The Court of Appeals thus properly concluded that there was not "substantial" evidence sufficient to overcome either the presumption or the lay and expert testimony presented by the respondent, and correctly reversed the Decision and Order of the Benefits Review Board.

In so acting, the Court of Apeals followed long and well-established judicial directives, and grant of certiorari is thus inappropriate and unwarranted.

II

THE DECISION OF THE COURT OF APPEALS IS IN HARMONY WITH PREVIOUS DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT, AND WITH THOSE OF OTHER CIRCUITS

The decision of the Court of Appeals is not only correct, but also well reasoned, following both the statutory directives of the Longshoremen's and Harbor Workers' Compensation Act and the judicial interpretations thereof. It is well established that in cases arising under the Act the function of the Court of Appeals is to determine whether the Benefits Review Board properly adhered to its scope of review. In order to accomplish this, it is the duty of the Court to make an independent review of the record to decide whether the findings of the Administrative Law Judge were supported by substantial evidence. *Sun Shipbuilding & Dry Dock Company v. McCabe* 593 F.2d 234, 237 (3rd Cir. 1979). The scope of review has been described repeatedly by the various Courts of Appeals, and represents a consistent application of the same standard, whether the Courts affirmed lower decisions or reversed them. *See e.g. Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008 (5th Cir. 1981); *Director, Office of Workers' Compensation Programs v. National Van Lines,* 613 F.2d 972 (D.C. Cir. 1972); *John T. Clark and Son v. Benefits Review Board,* 621 F.2d 93 (4th Cir. 1980).

Petitioner in the case erroneously relies on a recent Third Circuit opinion, *Walker v. Universal Terminal and Stevedoring Corp.*, ____ F.2d ____ (3rd Cir. 1981), 13 B.R.B.S. 275 (1981). *Walker* is obviously inapposite to the case at bar. In *Walker,* the Administrative Law Judge had considered a death claim; the question was whether the claimant's death was caused solely by intoxication.

At issue was the weight to be given to reports made after Walker's death by physicians who had never treated him. It should be noted that the passage quoted by the petitioner is *dicta, not* a holding: What the appellate court might have done if the Administrative Law Judge had found differently from the way he did has relevance neither to the decision in that case, nor to the case at bar.

In the present case, the Court of Appeals held that the Administrative Law Judge had not only ignored the statutory presumption which favored the claimant (33 U.S.C. § 920) (*See e.g., Wheatley v. Adler,* 402 F.2d 307 (D.C. Cir. 1968) (en banc); *Bath Iron Works Corp. v. White, supra*), but that he had failed to consider properly the testimony of the two treating physicians, which deserved more weight than the testimony of one physician who examines the claimant but once. (*See Combs v. Gardner,* 382 F.2d 949 (6th Cir. 1967); *Shaw v. Harris,* Civ. No. 79-869 (D.D.C. Nov. 5, 1979). Moreover, the Court found that the Administrative Law Judge had "badly misunderstood the importance of the treating physician's testimony." [Pet. App. 23(a)]. In sum, the Court of Appeals in this case behaved exactly as did the Third Circuit Court in *Walker:* they both conducted the mandated review of the record as whole applying the same substantial evidence standard.

Moreover, the Third Circuit Court applied the same standard in *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs,* 629 F.2d 1327 (9th Cir. 1980), which was also cited by petitioner WMATA. Far from being in conflict with the case at bar, the Bumble Bee decision is another illustration of an appellate court conducting an independent review of the administrative record. The same holds true for the other Longshore Act case referred to by petitioner, *Todd Shipyards Corp. v.*

Donovan, 300 F.2d 741 (5th Cir. 1980). It is not at issue that the Benefits Review Board was upheld in these three cases, nor is it relevant. What is relevant is that there is no conflict, apparent or otherwise, among these decisions because the same standard was applied in each. Following petitioner's reasoning to its illogical conclusion would mean a conflict existed among the circuits whenever the Benefits Review Board was overruled by an appellate court, a result clearly contrary to the statutory and judicial principles governing such review.

As their clearly exists no conflict between the Circuit Courts of Appeals as to the correct judicial standard of review, there is no issue justifying the exercise of certiorari jurisdiction, and the petition at bar should be denied.

CONCLUSION

Respondent requests this Court deny the petition for writ of certiorari.

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